



The 2015 climate change agreement: questions and design choices

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- A strong review mechanism could help to overcome the gap between nationally determined contributions and the emission reductions that will be necessary to slow climate change to a safer level.
- The design of reviews and other elements of the 2015 agreement, including its legal form, should be informed by important new findings from research about international law, behavioural economics and cognitive psychology.
- The new research also has implications for the negotiating process: for example, a bias in favour of the status quo may play a greater role than many realize.

Introduction

This paper considers some questions and design choices facing negotiators of the 2015 climate change agreement. It suggests that emerging insights from new research on international law, behavioural economics and cognitive psychology could help to design the 2015 agreement in a way that makes it as strong as possible and acceptable to as many states as possible.

The world is not making enough progress towards slowing climate change to a safer level. For example UNEP's Global Environmental Alert Service (GEAS) recently confirmed that the "emissions gap" and with it the "adaptation gap" are increasing.¹

¹ Zinta Zommers, Emissions and Adaptation Gaps: Can we bridge the cracks in climate policy? UNEP Global Environmental Alert Service (GEAS), February 2014, available at http://na.unep.net/geas/getUNEPPageWithArticleIDScript.php?article_id=109.

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The most challenging question for the 2015 agreement will be how to overcome the gap between nationally determined contributions and the greenhouse gas emission reductions that are needed to slow climate change. The right design choices, including a strong review mechanism, could help to overcome this gap.

Duration of the 2015 climate change agreement

Parties, for example the United States² and Switzerland³, have stated a preference for the 2015 agreement to last a long time. It is understandable that countries would like to avoid new, time-consuming negotiations. However, it is also important to consider the risks of locking in an inadequate agreement for a long time period.

Unless Parties are confident that the 2015 agreement will deliver the emission reductions that are needed to slow climate change it could be better for the agreement or its main provisions to apply for a limited time. Such a time period could be followed by for example a review conference.

Another approach would be to ensure that the 2015 agreement contains a strong review mechanism or mechanisms. The more enduring the new agreement is meant to be, the more important such a mechanism will be.

Review of the effect and ambition of the 2015 agreement

The 2015 agreement is likely to contain various review processes, including: some type of review of intended nationally determined contributions; review of implementation; and review of the effect and ambition of the agreement. How these should be linked and if review elements should be blended into one review mechanism are among the design questions to consider.

Reviews can be expected to form an important part of the 2015 agreement. For example, the European Union (EU) envisages a process for regular assessment and if necessary upward adjustment of individual and collective mitigation commitments.⁴

The United States identifies reviews of Parties' implementation as essential, stating that this would: enable other Parties and the international community to know the extent of implementation; allow

² U.S. Submission on Elements of the 2015 Agreement, available at http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/u.s._submission_on_elements_of_the_2105_agreement.pdf.

³ Elements of the 2015 Agreement – Switzerland's views, available at http://unfccc.int/files/bodies/application/pdf/elements_of_the_agreement_adp_ws1_switzerlands_views.pdf.

⁴ The 2015 Agreement – Priorities for 2014, submission by Greece and the European Commission on behalf of the European Union and its Member States. Available at http://unfccc.int/files/bodies/application/pdf/el-02-28-eu_adp_ws1_submission.pdf.

Parties to assess the sufficiency of the global effort in the aggregate; and would provide a powerful incentive for implementation.⁵

Switzerland refers to a “dynamic mechanism”, stating that the agreement should include provisions for regular review of the adequacy of global ambition in stabilizing greenhouse gas emissions in line with the ultimate objective of the Convention and in light of the latest scientific evidence.⁶

Designing such a review mechanism is challenging, but a well-functioning review mechanism could potentially help to bridge the gap between self-defined national contributions and the global emission reductions that are necessary. Ensuring that a strong review mechanism forms part of the 2015 agreement could help to meet the “credibility gap” that the agreement may otherwise face.

As noted in a recent [FIELD brief](#) one possibility could be to create a link between the 2015 agreement and periodic reviews under the UN Framework Convention on Climate Change (UNFCCC). After the 2013-2015 review, currently under way, reviews will take place following adoption of new assessment reports by the Intergovernmental Panel on Climate Change (IPCC) or at least every seven years.⁷

One challenge would be that the Parties to the 2015 agreement may not be the same as the Parties to the UNFCCC. Separate, overlapping reviews under the UNFCCC and the 2015 agreement could be duplicative and unhelpful, but on the other hand could also provide opportunities for creative structuring of reviews.

Review: some design considerations

Design of reviews in the 2015 agreement can draw on emerging research findings about international law, behavioural economics and cognitive psychology. As FIELD has [highlighted earlier](#), the new research findings have surprising and far-reaching implications for design of international treaties. Findings from this area of research also have implications for the design of other elements of the 2015 agreement and, as considered further below, for the negotiating process.

Research by Jean Galbraith has shown that differences in “framing” of the same legal content can have a decisive effect on whether or not states accept certain obligations. In at least some circumstances, the framing appears to be more important than the substantive legal content.

In an [article on treaty design](#) Professor Galbraith has shown how biases such as the status quo bias and salience bias, and peer effects, align strongly with certain treaty-related choices that states have

⁵ Note 2 above.

⁶ Note 3 above.

⁷ Decision 2/CP.17, paragraph 167.

made.⁸ As a consequence the choice of how the same legal content is framed can become the make-or-break factor in whether states accept it or not.

Although more research is needed, drawing on the growing understanding of the “built-in” biases or preferences that states display when negotiating and ratifying international treaties can help negotiators to design the 2015 agreement in a way that makes it as strong as possible and acceptable to as many states as possible.

The research findings have a range of potential implications for the design of reviews in the 2015 agreement. For example, research related to bilateral investment treaties suggests that states may display biases that underestimate future risks. This could suggest that states might prefer obligations that are realized in the future and that are linked to risks, for example high CO₂ concentration levels.⁹ Taking this into account Parties could for example consider the possibility of incorporating some type of future “trigger points” in a review mechanism, with strengthened emission reductions in mind.

Legal form of the 2015 agreement

The decision to launch a process to develop “a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties”¹⁰ leaves a range of options open.

The EU for example favours a new protocol under the Convention.¹¹ India’s view is that an agreed outcome with legal force could include COP decisions and setting up of institutions and bodies with differing degrees of binding-ness under the provisions of domestic and international law.¹²

Many Parties envisage adoption of a “2015 package” in Paris, which would include a new climate change agreement and related decisions. Various formats are possible. For example, presumably it could include more than one protocol or other instrument, if that turned out to be a helpful way of framing the outcome of the negotiations.

⁸ Jean Galbraith, Treaty Options: Towards a Behavioral Understanding of Treaty Design (October 9, 2012). Virginia Journal of International Law, Vol. 53, p. 309 (2013). Available at SSRN: <http://ssrn.com/abstract=2159244>.

⁹ Behavioural insights, legal form and the future climate change agreement, Summary Notes, FIELD web discussion, 4 November 2013, available at http://www.field.org.uk/sites/field.org.uk/files/papers/FIELD%20Summary%20Behavioural%20Insights%2C%20Legal%20Form%20%26%20Climate%204%20Nov%202013_0.pdf.

¹⁰ Decision 1/CP.17.

¹¹ Note 4 above.

¹² Submission by India on the work of the Ad-hoc Working Group on the Durban Platform for Enhanced Action (9 March 2013) available at http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_india_workstream_2_20130309.pdf.

Whatever format Parties choose in the end, negotiators of the 2015 agreement can draw on emerging findings from research related to treaty design, behavioural economics and cognitive psychology to help them construct an effective agreement.

As noted further research is needed, including specific research related to climate change. However, work so far by Jean Galbraith suggests that negotiators who are aiming for robust treaties should avoid provisions that require states to opt in.¹³

If participation in a certain part of a treaty needs to be optional to ensure wide participation in the treaty, Professor Galbraith recommends considering opt-out provisions or allowing states to make reservations. If neither of these alternatives is available, she recommends favouring optional protocols. This approach would harness status quo and salience biases in favour of more robust treaty obligations.¹⁴

Professor Galbraith suggests that negotiators who wish to discourage states from making reservations or taking advantage of opt-out provisions could, for example, include provisions that require reservations and opt-outs to be renewed every few years.¹⁵

The negotiating process: questions to consider

As noted earlier research relating to international law, behavioural economics and cognitive psychology has implications not only for the design of treaties, but also for the negotiating process.

For example, in a [recent article](#) Tomer Broude raises several questions that are relevant for the negotiations on the 2015 agreement.¹⁶ The article explores application of behavioural economics to international legal issues. Broude addresses methodological considerations and suggests indicative research frameworks for three challenges: (a) the inefficiency of development of international law; (b) collegiality and dissent in international tribunals; and (c) target selection in armed conflict.

In relation to treaty law Broude considers the argument that in many cases the main obstacle to progress towards effective global legal solutions is the strict requirement for consent: a state withholding consent can stand in the way of new treaty arrangements or reforms of existing treaties.¹⁷

¹³ Note 8 above, p 357.

¹⁴ As above.

¹⁵ As above, p 359.

¹⁶ Tomer Broude, Behavioral International Law (September 5, 2013). Hebrew University of Jerusalem International Law Forum Research Paper No. 12-13. Available at SSRN: <http://ssrn.com/abstract=2320375> or <http://dx.doi.org/10.2139/ssrn.2320375>

¹⁷ As above, pp 27 - 32.

He then asks if states could be withholding consent to new treaties or changes to treaties not - or not only - because they believe that it is in their interest, but because of a bias in favour of the status quo. If that were the case it would mean that relaxing the requirement for explicit consent by states would not resolve the problem. He suggests that decision-making in the World Trade Organization (WTO) could support such an interpretation: despite allowing for various forms of majority decision-making “a culture of consensus continues to govern decision-making”.¹⁸

Another question raised by Broude concerns issues related to “groupthink”, when dynamics and pressures within a group lead to bad joint decisions. He considers various decision making groups in international law.

When considering “legal groupthink” and research approaches he suggests, as an example, the following potential research question: “to what extent do legal advisors engaged in considering new international commitments, such as in the areas of climate change or trade agreements, rely on the legal status quo, instead of exercising their independent judgment on the best possible solutions?”¹⁹

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¹⁸ As above, p 30.

¹⁹ As above, p 21.